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**IN THE
COURT OF APPEALS OF INDIANA**

JANET H. DEVITTORIO,

Appellant-Defendant,

vs.

JOSEPH M. DEVITTORIO,

Appellee-Plaintiff.

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No. 43A03-0708-CV-382

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0208-DR-629

APRIL 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant-Petitioner Janet H. DeVittorio (“Janet”) appeals from the trial court’s order denying her verified petition to enforce payment agreement relating to the dissolution of her marriage to and property settlement agreement with Appellee-Respondent Joseph M. DeVittorio (“Joseph”).

We affirm.

ISSUES

Janet raises the following issues for our review which, restated, are:

- I. Whether the trial court erred by finding that there was no enforceable oral agreement to modify Janet’s requirement to pay Joseph a \$300,000.00 property equalization payment; and
- II. Whether the trial court erred by finding that there was no enforceable oral agreement to modify Janet’s responsibility to make the mortgage payments and Joseph’s responsibility to make alimony payments beginning in October of 2005.

FACTS AND PROCEDURAL HISTORY

Janet and Joseph’s marriage was dissolved on April 7, 2005. The parties’ settlement agreement (“the Agreement”) was incorporated in the decree. At the time of the entry of the decree, Janet and Joseph owned two parcels of real estate, a marital residence (“the Main House”) and a guest house, (“the Guest House”). The Main House and Guest House were subject to a mortgage in the amount of \$1,200,000.00. Pursuant to the terms of the Agreement, Janet received the Main House. The Agreement also made specific provisions for the sale of the Guest House. Another term of the Agreement required Joseph to pay alimony to Janet after the sale of the Guest House. The

Agreement provided that Janet would make a property equalization payment to Joseph once certain other conditions were met. The only modification or waiver of the terms or conditions of the Agreement that would be effective would be those executed in writing and filed with the trial court.

One of the terms of the Agreement was that the Guest House was to be listed with a realtor for sale. If the Guest House did not sell before July 1, 2005, then it was to be sold at an auction to be held no later than August 15, 2005. There was another specific provision in the event that there was a mortgage deficiency after the Guest House sold.

Ultimately, the Guest House did not sell on the open market and had to be auctioned. The auction, however, did not occur according to the timeframe provided in the Agreement, but on November 19, 2006. At the auction both the Guest House and the Main House were sold for a combined \$1,800,000.00. The events leading up to, during, and after the auction of the two parcels of real estate are the subject of this appeal, and will be discussed further below. Suffice it to say, the Agreement was very specific about the parties' responsibilities based upon the August 15, 2005 auction timeframe. As soon as the parties deviated from the Agreement by delaying the auction, there were no provisions in place outlining the responsibilities of the parties above and beyond the requirement that modifications were to be submitted in writing to the trial court.

On January 5, 2007, Janet filed a verified petition to enforce payment agreement. Later, on March 21, 2007, Janet filed a motion to enforce settlement agreement and a motion to enforce oral agreement. On May 15, 2007, a hearing was held on the pending motions. The parties each submitted proposed findings of fact and conclusions of law.

On June 13, 2007, the trial court adopted Joseph's proposed findings and entered an order adopting those findings. Janet filed her motion to correct error on July 12, 2007, which the trial court denied the same day. The present appeal follows.

DISCUSSION AND DECISION

STANDARD OF REVIEW

When a party has requested special findings of fact and conclusions of law pursuant to Ind. Trial Rule 52(A), as is the case here, we may affirm the judgment on any legal theory supported by the findings. *See Kondamuri v. Kondamuri*, 852 N.E.2d 939, 944 (Ind. Ct. App. 2006). In reviewing the judgment, we first must determine whether the evidence supports the findings, and second, whether the findings support the judgment. *Id.* Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. *Id.* The judgment will be reversed if it is clearly erroneous. *Id.* To determine whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom. *Id.* We will not reweigh the evidence or assess witness credibility. *Id.* Even though there is evidence to support it, a judgment is clearly erroneous if the reviewing court's examination of the record leaves it with the firm conviction that a mistake has been made. *Id.* A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. *Id.*

I. EQUALIZATION PAYMENT

First, Janet argues that the trial judge erred by finding that without a signed agreement, he could not modify the property equalization payment from Janet to Joseph.

Janet claims that she presented sufficient credible evidence at the hearing to establish that the parties orally modified the provision of the decree relating to the property equalization payment.

As stated above, the parties were unable to sell the Guest House on the open market, and failed to auction the Guest House by the date provided in the Agreement. Janet and Joseph each presented testimony regarding the events that occurred at the auction. The homes were placed for auction with a reserve on the selling price for both homes. Janet was not required to sell the Main House under the terms of the Agreement; however, she was in default on the payment of the mortgage and in jeopardy of foreclosure. Each house was auctioned, but the resulting separate bids on the houses were far lower than Janet wanted. Ultimately, the houses were sold together for \$1,800,000.00.

Janet and her financial advisor testified that there were negotiations with Joseph occurring during the auction. Janet testified that she was willing to remove the reserve on the Main House in exchange for Joseph's agreement to accept \$100,000.00 as the property equalization payment. The Agreement provided that Janet pay Joseph \$300,000.00 as a property equalization payment due upon the termination of Joseph's obligation to pay alimony to Janet. Appellant's App. p. 20. The sale of the Main House was one of the events described in the Agreement that would mark the end of Joseph's obligation to pay alimony. *Id.* Joseph's potential alimony obligation was \$3,500.00 per month for sixty months, or \$210,000.00. *Id.*

Janet and her financial advisor both testified that on two separate occasions Joseph verbally agreed to accept the reduced property equalization payment in exchange for Janet removing the reserve on the properties. However, Joseph testified that he merely agreed to consider taking the reduced amount. In the end, Janet removed the reserve from the properties, and they were successfully auctioned. Janet and her advisor testified that Joseph refused to sign a document drafted by Janet's advisor spelling out the agreement to accept the reduced payment in exchange for the sale of the Main House. Joseph stated that he wanted to have his lawyer look over the document prior to signing it. Joseph never signed that document or the subsequent document submitted to him by Janet's lawyer reflecting the purported agreement.

While we may have ruled differently if presented with the above testimony, that is not our task on review. Janet's testimony is in conflict with Joseph's testimony. However, there is sufficient evidence to support the trial court's findings, and the findings support the trial court's judgment in favor of Joseph.

Furthermore, the trial court correctly concluded that without a signed document, the alleged modification could not be enforced. While Janet correctly notes that Ind. Code §31-15-2-17(c) provides that parties may subsequently consent to modification of settlement agreements, subsection (a) provides in relevant part that the parties may agree *in writing* to provisions for disposition of any property owned by the parties. The policy behind this statute, promoting amicable settlements of disputes that arise in divorce proceedings, applies equally to dissolutions in the first instance and later petitions for modification. *See Akers v. Akers*, 849 N.E.2d 773, 775 (Ind. Ct. App. 2006). This Court

has held that absent a memorialization of the purported agreement, either in writing or on the trial court record, there is nothing for the trial court to approve. *Id.* at 776. Either party is free to repudiate the alleged agreement. Such is the case here. Moreover, the Agreement provided, in paragraph 20, that none of the terms or conditions of the Agreement could be modified unless the modifications were executed in writing. Appellant's App. p. 26. It is undisputed that Janet did not file a petition with the trial court to modify the Agreement.

Janet argues, in the alternative, that Joseph should be promissorily estopped from failing to abide by the purported agreement to reduce the property equalization payment in exchange for Janet removing the reserve at auction. However, Janet's argument fails because she was unable to establish one of the elements of promissory estoppel, a promise by Joseph to reduce the equalization payment. *See Brown v. Branch*, 758 N.E.2d 48, 52 (Ind. Ct. App. 2003).

The trial court's findings are supported by the evidence, and the trial court's judgment is supported by the findings. The trial court did not err.

II. MODIFICATION OF MORTGAGE/ALIMONY PAYMENTS

Next, Janet argues that the trial court erred by failing to enforce a purported oral agreement to modify the Agreement with respect to the mortgage payments. Although the trial court found otherwise, Janet contends that Joseph agreed to pay \$3,500.00 per month in alimony to Janet in exchange for her paying the mortgage payment of \$6,376.96 beginning in October of 2005.

The Agreement provided that Janet assumed the mortgage against the Main House, subject to certain other terms of the Agreement including a provision holding Joseph harmless from payment of obligations relating to the Main House. The monthly mortgage payment on the Main House was \$6,376.96. The Agreement also provided that Joseph was required to pay alimony to Janet in the amount of \$3,500.00 per month beginning the fifteenth day after the closing of the sale of the Guest House. Joseph was required to pay alimony to Janet until the earlier of the following events: 1) the sale of the Main House, 2) sixty months of payment, 3) Janet's death, or 4) Joseph's unemployment.

Janet testified that after the parties agreed to keep the Guest House on the market and did not sell the Guest House at auction by August 15, 2005, they reached an oral agreement whereby Joseph would begin paying alimony to Janet in exchange for her paying the mortgage. Janet testified that she had no written agreement with Joseph to that effect, and that she did not petition the trial court to modify the terms of the Agreement. Joseph testified that they had no oral agreement regarding the alimony and mortgage. He stated that he voluntarily paid the mortgage in September of 2005. He further testified that additional payments made in October and November of 2005, and in January of 2006, were voluntarily made by him because Janet needed the money, not because of an agreement reached between the two.

Clearly, the testimony of Janet and Joseph on this issue is in conflict. While we might have decided this matter differently, that is not our task here on review. There is

ample evidence to support the trial court's findings, and the findings support the trial court's judgment in favor of Joseph.

Again, as stated in the discussion of the previous issue, there is no written agreement supporting Janet's claim of oral modification of those payment terms. Without the writing either party was free to repudiate the purported agreement. Such was the case here.

Janet argues that the parties waived the Agreement language requiring modification in writing and presented to the trial court, by leaving the Guest House on the market and failing to abide by the requirement that the Guest House be sold at auction no later than August 15, 2005. However, the record reflects that those were the only two modification issues settled by the parties. Both Janet and Joseph testified that they were in accord about those matters. The problems that arose due to that deviation, such as responsibility for paying the mortgage and alimony, were planned for in the Agreement only to the extent that the necessary modifications had to be made in writing and presented to the trial court. Janet's argument that the writing requirement for modifications was waived fails here.

CONCLUSION

The trial court's findings and conclusions in favor of Joseph on the issues of modification of the property equalization payment and mortgage/alimony payments is supported by the evidence. The trial court did not err.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.